

Marian Manor for the Aged and Infirm, Inc. and Service Employees International Union, Local 285, AFL-CIO, Petitioner. Cases 1-RC-21240 and 1-RC-21241

April 24, 2001

ORDER DENYING REVIEW

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

The Board has delegated authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (pertinent portions are attached) and the Petitioner's opposition. The Employer requested review with respect to the Regional Director's finding that the Employer's staff nurses are not statutory supervisors, the Regional Director's affirmation of certain evidentiary rulings made by the hearing officer, and the Regional Director's exclusion of several classifications from the bargaining units found appropriate. The request for review raises substantial issues solely with respect to the exclusion of the admissions coordinator and bookkeeper IV from the bargaining units found appropriate. However, the Board concludes that these issues may best be resolved through the challenge procedure. Accordingly, the request for review is denied in this and all other respects, and the decision is amended to permit the admissions coordinator and bookkeeper IV to vote subject to challenge.

Another issue involves the Employer's subpoena seeking the production of the responses to the Petitioner's survey of Employer's nursing staff. That survey questioned staff nurses as to their authority with respect to the indicia of supervisory status under Section 2(11) of the Act. The hearing officer refused to enforce the subpoena, the Regional Director affirmed, and the Employer seeks review of the ruling. We find that the hearing officer did not err in determining that the Employer was not entitled to the documents sought.

The Board has held that in questions regarding the enforcement or revocation of subpoenas the Federal Rules of Civil Procedure, although not binding on this Agency, provide useful guidance and should be consulted by Regional Directors and hearing officers when ruling on motions. See *Brink's, Inc.*, 281 NLRB 468 (1986). Section 26(b)(3) of the Federal Rules of Civil Procedure provides that a party seeking to obtain documents prepared by another party in anticipation of litigation must show both that the party seeking the documents has a substantial need for the materials in preparation of his case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Applying this standard, we agree with the Employer that evidence with respect to the authority and functions of the Employer's staff nurses was necessary for the Employer to prepare and proceed with its case. However, we find that the Employer has failed to show that it was unable to obtain by other means, the substantial equivalent of the materials contained in the survey responses. Thus, the Employer had access to its own employees and could have sought to obtain information from them regarding supervisory indicia. Indeed, the Employer called witnesses at the hearing and questioned them with respect to the supervisory issue, and it cross-examined the Petitioner's witnesses at length with respect to their alleged supervisory status. The survey form itself was made part of the record. The Employer could have examined the nursing staff witnesses as to the survey questions and their answers to them. Therefore, we find that the Employer has failed to show that it was unable to obtain the substantial equivalent of the materials by other means.

Our dissenting colleague fails to acknowledge that it is the Employer's burden to make this showing. Although conceding that the Employer could examine the nurses without the survey responses, he asserts that this would not be as effective. However, the survey responses are not sworn statements and are of limited probative value, especially given the nonadversarial nature of representation proceedings. Thus, while we agree with our dissenting colleague that the purpose of a hearing is the "search for truth," nonetheless a preelection hearing is investigatory in nature and credibility resolutions are not made. Therefore, given both the need for expeditious handling of representation cases and the limited probative value of the survey responses, we find on balance that the "search for truth" is not jeopardized by the hearing officer's ruling that the Employer was not entitled to the documents sought.

In sum, we find that the hearing officer did not err by refusing to require the production of the survey responses. Moreover, in view of our finding that the Employer had ample opportunity to, and did, examine and cross-examine witnesses regarding the supervisory issue, even assuming *arguendo* that the Employer was entitled to these documents, we find that the Employer has not established that it was prejudiced by the refusal to enforce the subpoena.

ORDER

The Employer's request for review of the Regional Director's Decision and Direction of Election is denied, and the Decision is amended to permit the admissions coordinator and bookkeeper IV to vote subject to challenge.

MEMBER HURTGEN, dissenting in part.

I would not quash the subpoena.

The Employer sought to show that nurses were supervisors. The Petitioner had conducted a survey of nurses on this very issue. The survey was designed to ascertain, from nurses, the extent of their authority and responsibility. The subpoena sought the responses of the nurses. Clearly, the responses are relevant. Further, if the Employer had those responses, it could effectively examine and/or cross-examine witnesses concerning the extent of their authority and responsibility. That is, the Employer could confront them with their individual responses.¹ The Employer was denied the opportunity to do so. Although the Employer could examine the nurses without the survey response, that would not be as effective as examining them with the survey response. The R-case hearing is a search for truth, and the subpoenaed documents are relevant to that search.

My colleagues say that representation proceedings are nonadversarial in nature and that credibility resolutions are not made therein. However, these assertions do not contradict the unassailable fact that the proceedings are a search for truth. Clearly, cross-examination (with a document of the witness) is an effective mechanism for ferreting out that truth. Indeed, after such an examination, it may turn out that there is no credibility conflict at all, i.e., the witness may concede the truth of the document or can satisfactorily explain any inconsistencies.

My colleagues assert that “the survey responses are of limited probative value.” It is unclear to me how my colleagues can assess “probative value” of the responses without allowing their use. As discussed above, a cross-examiner could use those responses to clarify or challenge the testimony of the alleged supervisors. It is utterly impossible to say, a priori, that the responses would be of “limited probative value.” Similarly without permitting a test of probative value, it cannot be said, a priori, that the Employer suffered no prejudice by precluding the use of these responses.

Finally, my colleagues suggest that the Employer had a “substantial equivalent” of the surveys. However, they fail to show what that “substantial equivalent” would be. Obviously, the Employer’s questioning of the alleged supervisors would not yield the substantial equivalent of the responses that they provided in writing to the Petitioner.

Accordingly, I would grant the subpoena, remand for further hearing, and then decide the supervisory issue.

¹ Each response contains the nurse’s name. Although it is not signed, the Employer, on examination or cross-examination, could ascertain whether the nurse filled out the survey form.

APPENDIX

DECISION AND DIRECTION OF ELECTION

On petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

On the entire record in this proceeding, I find

1. The hearing officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. Marian Manor for the Aged and Infirm, Inc. (Marian Manor) is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter.

3. Service Employees International Union, Local 285, AFL–CIO (Local 285) claims to represent certain employees of Marian Manor.

4. A question affecting commerce exists concerning the representation of certain employees of Marian Manor within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Marian Manor operates a nursing home in South Boston, Massachusetts. Local 285 seeks to represent two units of employees employed by Marian Manor, a service and maintenance unit¹ and a unit of staff nurses, including registered nurses (RNs) and licensed practical nurses (LPNs). Marian Manor asserts that its staff nurses and senior nursing assistants (SNAs) must be excluded from any unit found appropriate as statutory supervisors. Marian Manor further asserts that the smallest appropriate unit must include all of its nonsupervisory employees.²

Should I find the service and maintenance unit sought by Local 285 to be appropriate, Marian Manor maintains, in the alternative, that that unit must include maintenance mechanics, painters, a carpenter, a groundskeeper, assistant admissions

¹ The service and maintenance unit sought, as described in the petition, includes nursing assistants, senior nursing assistants, cooks, dietary aides, food service workers, bakers, laundry workers, activities leaders, office assistants, porters, housekeepers, resident care techs, rehab aides, stock clerks, storeroom clerks, unit assistants, unit secretaries, hairdressers, and clinic coordinators. At the hearing, the parties stipulated, and I find, that the positions of assistant cook and kitchen porter should also be included in the service and maintenance unit.

At the hearing, the parties also stipulated that the groundskeeper in the maintenance department should be included in the service and maintenance unit. In its posthearing brief, Local 285 asks to be relieved of that stipulation as inconsistent with Board policy, contending that the groundskeeper has more in common with other maintenance department employees whom it seeks to exclude from the unit as skilled maintenance employees.

² In addition to those employees sought by Local 285, Marian Manor’s proposed wall-to-wall unit would include the following classifications: maintenance mechanic, painter, carpenter, groundskeeper, case mix/safety nurse, social worker, admissions coordinator, assistant admissions coordinator, nursing secretary, medical secretary, medicare coordinator, RN assessment and care plan coordinator, MDS nurse, accounts receivable supervisor, accounts payable clerk, bookkeeping clerk, bookkeeper IV, posting clerk, payroll distribution clerk, staff development assistant, switchboard operator, relief operator, and clerk-typist.

coordinators, staff development assistants, and various clerical employees.³ Local 285 would exclude all of these employees from its proposed service and maintenance unit. In particular, it asserts that the maintenance mechanics, carpenter, and painters should be excluded from the unit as skilled maintenance employees, and that the accounts payable clerk, accounts receivable supervisor,⁴ posting clerk, bookkeeping clerks, payroll distribution clerk, switchboard operator, relief operators, and clerk/typist should be excluded from the unit as business office clericals. Local 285 contends that bookkeeper IV belongs in a unit of other professional employees or, alternatively, should be excluded as a business office clerical.

Should I find the petitioned-for unit of staff nurses, including RNs and LPNs, to be appropriate, Marian Manor appears to contend, in the alternative, that the staff nurse/RN/LPN unit must include a Medicare coordinator, an RN assessment and care plan coordinator, an MDS nurse, a case mix/safety nurse, social workers, and an admissions coordinator, while Local 285 would exclude all of those employees.

Supervisory Status of Staff Nurses and Senior Nursing Assistants

Marian Manor asserts that its staff nurses are statutory supervisors on the basis of their authority to assign, responsibly direct, evaluate, and discipline the CNAs and RCTs. It asserts that the SNAs are statutory supervisors on the basis of their authority to assign, responsibly direct, and discipline the CNAs. I find that Marian Manor has failed to meet its burden of demonstrating the supervisory status of either classification.

Assignment of Work and Responsible Direction

Marian Manor operates a 366-bed nursing home, the largest skilled care facility in Massachusetts. The home consists of four buildings, North, South, East, and West, that house eight skilled nursing units and one 11-bed rest home unit. Its nursing department staffs the units in three shifts, 7 a.m. to 3 p.m., 3 to 11 p.m., and 11 p.m. to 7 a.m.

Sister Pauline Ross is the home's administrator.⁵ Director of nursing, Ann Sheehan, reports to Ross, and assistant director of nursing, Theresa Balbuena, reports to Sheehan. Four unit supervisors⁶ and several nursing supervisors report to Balbuena.⁷ The unit supervisors, each of whom is responsible for two

units, cover the day shift. The nursing supervisors cover the evening and night shifts. They cover either all or half of the units during their shifts. Depending on the unit and the shift, each of the eight units is staffed by one to two staff nurses,⁸ an SNA,⁹ three to seven certified nursing assistants (CNAs), and a varying number of unit assistants and resident care techs (RCTs);¹⁰ fewer employees cover the evening and night shifts than the day shift. The staff nurses may be either RNs or LPNs; their role is the same regardless of their status as RNs or LPNs. The staff nurses and SNAs report to a unit supervisor or nursing supervisor, depending on the shift. The CNAs and unit assistants report to the staff nurses and SNAs. The RCTs report to the staff nurses.

CNAs perform duties such as feeding, bathing, dressing, toileting, changing, weighing, and ambulating nursing home residents, and transporting them to appointments. Unit assistants are less skilled than CNAs and are not permitted to touch residents. They perform tasks such as making beds, passing food trays, transporting residents or supervising residents in the dining room. RCTs, who are often student nurses or nurses waiting to pass their Board exams, perform tasks such as simple treatments, changing dressings, taking vital signs, or sitting with ill or dying residents.

CNAs are regularly assigned to the same unit. The staff nurses, SNAs, and CNAs on the unit collaboratively divide each unit's residents into groups denominated Group 1, Group 2, and so on. They try to balance the groups in terms of the degree of care required by the residents. The groups change only in the event of a discharge or a change in a resident's condition that calls for rebalancing the workload. Each CNA is assigned to care for the residents in one of these groupings for his or her shift. The CNAs rotate through the assignments numerically on a monthly basis. A staff nurse or SNA may switch either a CNA or a resident to another group, for example, when a CNA is having difficulty with a particular resident. Unit Supervisor Margaret Default, testified, however, that a staff nurse generally seeks her approval to move a difficult resident to another CNA. The staff nurses may also make such reassignments to accommodate a resident who expresses a preference for a female CNA or to avoid exposing a pregnant CNA to a particular resident for infection-control reasons.

There is a book for each group of residents that describes the care required for each resident. Regular CNAs know the daily routine prescribed for each resident. The SNAs conduct room by room checks on the residents to make sure that the CNAs have completed the required care, and they also check to make sure that the CNAs have documented the care provided, as required. Due to changes in a resident's condition, a staff nurse or SNA may direct a CNA to perform additional tasks or change the routine in some way. For example, a staff nurse may direct a CNA to take the temperature of an acutely ill resi-

³ The clerical employees at issue are a medical secretary, a nursing secretary, an accounts receivable supervisor, an accounts payable bookkeeper, three bookkeeping clerks, a bookkeeper IV, a posting clerk, a payroll distribution clerk, a switchboard operator, six relief operators, and a clerk-typist.

⁴ At the hearing, Local 285 took the position that the accounts receivable supervisor should be excluded from any unit found appropriate as a statutory supervisor, but it did not pursue this contention in its posthearing brief.

⁵ The Employer contracts with a Catholic religious order, the Carmelite Sisters, to manage the home. Ross and 10 other sisters work and live at the home.

⁶ One of the four unit supervisor positions is currently open.

⁷ The parties have stipulated, and I find that Administrator Sister Pauline Ross, Director of Nursing Ann Sheehan, Assistant Director of Nursing Theresa Balbuena, the unit supervisors, and the nursing supervisors are statutory supervisors who should be excluded from any unit found appropriate.

⁸ The staff nurses were referred to interchangeably throughout the record as staff nurses, charge nurses, or nurses.

⁹ The eight senior nursing assistants work only during the day, with hours such as 10 a.m. to 6 p.m. or 8:30 a.m. to 4:30 p.m.

¹⁰ Marian Manor employs eight unit assistants, all of whom work the day shift. There are two full-time RTCs as well as some part-time and/or on-call RCTs.

dent, to weigh a resident who is on a calorie count, to increase assistance to a resident whose arthritis has flared up, to give an ill resident extra fluids, or to inform the nurse when a resident has voided. She may instruct a CNA to dress a resident to go out with their family. She may instruct an aide to engage in "therapeutic lying" with a confused resident or instruct a CNA in how to handle other types of behavioral issues. Staff nurses and SNAs pitch in to assist the CNAs in performing their duties when need be. An SNA may occasionally take a group of residents herself to cover for an absent CNA.

Staff nurses play no role in staffing the units. They have no authority to authorize overtime, to call in CNAs to work, or to transfer CNAs between units. CNAs take their breaks at a certain time during the shift, taking turns so that they are not all on break at once. A staff nurse may ask a CNA to delay her break, for example, to assist a resident who has had an episode of incontinence. Director of Nursing Ann Sheehan testified that a staff nurse may allow a CNA to go home early, but there is no evidence as to the frequency with which this occurs or the circumstances surrounding such decisions.

Evaluations

Marian Manor's CNAs receive performance evaluations after 3 months of employment and annually thereafter. The current evaluation form requires the evaluators to rate the CNAs with respect to 14 criteria, by giving them both a numerical rating from one to five for each criterion, with five being the most favorable rating, and an explanation for the rating. The personnel department completes the section relating to attendance and punctuality. The points are added up for an overall performance rating. A score of 68 to 70 warrants an overall rating of "exceptional," a score of 48 to 67 points warrants an overall rating of "above average," a score of 28 to 47 equates to an overall rating of "average," and a score of 27 or less results in an overall rating of "unsatisfactory."

Unit supervisors generally complete the evaluation forms for CNAs and the RCTs on the day shift. The director of nursing testified that she was unaware that an SNA had ever completed an evaluation form. Unit Supervisor Margaret Default testified that, prior to completing an evaluation of a CNA, she consults with the senior nursing assistant who has worked with that CNA or, at times, a staff nurse, and she relies on their input. She asks if the SNA sees any problem with the CNA's work and if the CNA is doing his or her job appropriately. The SNA does not sign the evaluation form. Default presents the completed evaluation form to the CNA. A staff nurse or SNA may or may not be present, depending on their availability. Day shift staff nurse, Diane Walsh, testified that she has never been asked to complete a performance evaluation and has never given any input to her unit supervisor in connection with an evaluation, although she has had informal conversations with her unit supervisor regarding the quality of the work of the CNAs on her shift.

Staff nurses who cover the evening and night shifts complete evaluations for the CNAs, although nursing supervisors complete them in those instances that the staff nurses are too busy. Nursing supervisors review the evaluations completed by the staff nurses before they are finalized. Staff nurse, Susan Su-

plee, testified that her ratings have never been changed, and the director of nursing testified that she had never heard of a nursing supervisor changing a staff nurse's ratings.¹¹ Lori Golden, a staff nurse on the night shift, testified that she does not usually complete the rating for the "discipline" criterion; her nursing supervisor does that. She testified that in a few instances her nursing supervisor has returned an evaluation to her and told her that she needed either to justify the high ratings she gave or to change the rating. On one occasion Golden supported the rating; on another occasion, she lowered the score. This has not happened for a while, because Golden usually gives ratings of threes and fours rather than fives now.

Nursing supervisors customarily add their own comments to the evaluation before it is issued to the employee. The director of nursing or assistant director of nursing also reviews the completed evaluations. They may ask the evaluator to justify a rating by writing a specific comment, but they have never changed a rating. Nursing supervisors usually present the evaluations to the CNAs on the evening and night shifts.

The record reveals that the evaluations are not tied to wage increases for CNAs, nor do they include recommendations for retention or promotion. The director of nursing testified that she would review an employee's evaluations when considering a promotion. Human Resources Supervisor Joan Cameron, testified that Marian Manor provides scholarships to employees seeking to further their education.¹² The evaluation forms are part of the application for scholarships and are considered along with factors such as length of service. Cameron did not know how many such scholarships are granted annually. The current evaluation form states that staff members who rate "unsatisfactory" will have another evaluation in 3 months and that three consistent unsatisfactory ratings will result in termination. There is no evidence in the record that any CNA has ever been terminated as a result of unsatisfactory evaluations; the director of nursing was unaware of any CNA terminated based solely on poor evaluations, without the issuance of discipline.¹³

Discipline

Employees at Marian Manor may receive discipline in the form of counseling, a written counseling, a written warning, a second and final warning, and dismissal. The director of nursing testified, on the one hand, that staff nurses and SNAs have authority to and do impose all of these types of discipline. She also testified, however, that, although they have authority to issue warnings and terminate employees on their own, that is not how things work at Marian Manor. Staff nurses and SNAs

¹¹ In 16 of the 78 evaluations submitted into evidence, anywhere from one to seven of the ratings in the evaluation appear to have been crossed out and replaced, with the change initiated by the nursing supervisor who reviewed and signed the evaluation.

¹² The parties have stipulated, and I find, that Cameron is a statutory supervisor who should be excluded from any unit found appropriate.

¹³ Cameron testified that an employee who receives a rating of 27 or below would automatically receive discipline in the form of a counseling or warning. She gave no example of this taking place, and she also testified that employees would not receive discipline just because of an unsatisfactory evaluation, although an unsatisfactory evaluation might remind an evaluator that he or she had been remiss in failing to discipline that employee.

are expected to consult with their superiors regarding any disciplinary incident, and she expects the nursing supervisors to accept their recommendations regarding discipline.

The role of the staff nurses in issuing discipline was illustrated by the following examples: case mix coordinator Kathleen Annello, who was previously a nursing supervisor and still works every fourth week as a nursing supervisor, testified that when a staff nurse brings a disciplinary matter to her attention, she follows the staff nurse's recommendation after listening to all parties. On one occasion this year, staff nurse, Diane Walsh, told her that a particular CNA had failed to provide care to a resident and asked Annello to discipline her. Annello spoke to Walsh and three CNAs on the unit. She learned that the care had, in fact, been provided and that Walsh had failed to communicate which CNA had been assigned to the patient at issue. Annello clarified the assignment and determined not to discipline the CNA. In a second incident, a staff nurse told Annello that some CNAs would not accept a new CNA. After talking with the staff nurse and the CNAs involved, Annello disciplined some of the CNAs. In a third instance, a staff nurse told Annello that a CNA had taken a break before completing her work. Annello spoke with the CNA, who said that she had completed all of the required care and that the staff nurse had unreasonably expected her to toilet a resident while she was on her break. Annello agreed with the CNA and decided not to issue discipline.

Default testified that she expects staff nurses to consult her regarding situations that warrant discipline and that they never sign disciplinary forms, although they may be present as witnesses when they are issued. She does not recall a staff nurse recommending that any specific discipline be imposed. Default always interviews all parties involved to find out each side of the story and then makes a decision. In one instance, a staff nurse told her that two CNAs had had a verbal altercation in the presence of a resident. Default interviewed the staff nurse and the two CNAs herself and then reached the decision to issue discipline. Default signed the disciplinary forms; the staff nurse was present as a witness when she issued them.

Night shift staff nurse, Susan Suplee, testified that she has issued about three to four warnings to CNAs in the last 10 years, and none in the last year, for infractions such as failure to change a resident or sleeping on the job. She discusses disciplinary matters with her nursing supervisor first, who asks if Suplee wishes to issue a warning or handle it another way. She respects the supervisor's input. Either Suplee or her nursing supervisor fills out the warning form; the supervisor is always present when it is given to the employee.

Staff development director, Wanda English, who was previously a staff nurse for many years, testified that she never wrote up a CNA when she was a staff nurse, but it was her understanding that she was to consult with her unit supervisor prior to filling out a disciplinary form. On one occasion, English observed that a resident was injured, and she believed that the injury was inconsistent with the version of events related to her by a CNA. English took statements and called her supervisor, who also took statements and did a follow-up assessment of the resident with English. English recommended discipline, al-

though the record does not reveal what type of discipline she recommended. The nursing supervisor terminated the CNA.

Marian Manor introduced no disciplinary forms issued by staff nurses. Staff nurses Lori Golden and Melissa Parker testified that they have never issued a disciplinary form or recommended discipline. They report disciplinary incidents to their nursing supervisor, although Golden may talk to a CNA herself if the situation does not involve a major infraction. Parker has reported a sleeping CNA to her supervisor. The supervisor called the CNA in to her office and then asked Parker to sign a disciplinary form as a witness. On another occasion, Parker found a resident on the floor and reported it to her supervisor. The supervisor asked Parker to check whether the resident had been changed; Parker reported that the CNA had not changed her. She does not know if the CNA involved was disciplined. Staff nurse, Diane Walsh, also testified that she has never issued a disciplinary form and that she would go to her supervisor with any disciplinary matters. The only time she ever recommended discipline was the incident described above, in which her nursing supervisor, Annello, determined, after investigating, that discipline was not warranted.

With respect to the SNAs' role in discipline, unit supervisor, Margaret Default, testified that she and the SNAs have authority to issue discipline. She has observed an SNA give a written counseling form to a unit assistant. In that case, the SNA told her she would be issuing the counseling, and Default went along as a witness. An SNA under her supervision has also issued a written warning, but there is no evidence as to Default's role, if any, in the matter.

SNA Anestine Bentick testified that she has never disciplined an employee in her 7 years as an SNA and has never been told she has authority to discipline. She has brought disciplinary incidents to the attention of her unit supervisor and has made a suggestion as to what should happen. The record does not reveal whether she has ever suggested that any particular level of discipline be imposed. The unit supervisor has listened to Bentick and the employee involved and determined whether it was necessary to discipline that person. Bentick described two incidents where her unit supervisor did not accept her recommendation to impose discipline but also testified that a supervisor has followed her recommendation to impose discipline about three or four times.

Marian Manor introduced into evidence two written counseling forms issued by SNA Linda Parker, and a written counseling and written warning form issued by SNA Darlene Gregor. Gregor issued the written warning to a CNA for sleeping on the job, and someone whose name is illegible signed it as a witness. Gregor wrote in the warning that any further instances of sleeping while on duty would result in the employee's termination. There was no testimony by anyone with first hand knowledge of the process that led to the issuance of this warning by Gregor. Some of the written counseling forms also note that the employee's failure to comply with the rule violated would result in further disciplinary action.

Marian Manor also introduced three written counseling forms issued by SNA Mary Ellen Ciulla. Ciulla testified that she issued the written counseling forms on her own, although she may have notified her unit supervisor that she was going to

issue one of them. She testified that she and/or a unit supervisor engage in fact-finding prior to issuing discipline, and the unit supervisor may or may not be present when the disciplinary notice is given to the employee. Ciulla testified that she was given some guidelines regarding the level of discipline to impose, depending on the employee's disciplinary history, and that she refers to a book in the nursing office that indicates employees' prior discipline.

Secondary Indicia

All employees at Marian Manor receive the same fringe benefits, with one exception. Since November 1999, staff nurses and senior nursing assistants have been eligible for life insurance in the amount of \$20,000, the same amount of coverage that is provided for department heads, assistant department heads, and supervisors. Other staff members are eligible for life insurance in the amount of \$8000.

Nursing supervisors, unit supervisors, and SNAs wear white lab coats. Staff nurses wear scrubs with a print. CNAs wear scrubs and white pants. Unit assistants wear a yellow apron.

Analysis

Under Section 2(11) of the Act, the term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*¹⁴ The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. *New Fern Restorium Co.*¹⁵ The burden of proving supervisory status rests on the party alleging that such status exists. *Tucson Gas & Electric Co.*¹⁶ The Board will refrain from construing supervisory status too broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*¹⁷

The record persuades me that that staff nurses' and SNAs' assignment of work and direction of employees is routine and does not require independent judgment. The CNAs' tasks are routine, and they are familiar with their patients and their needs. The Board has held repeatedly that the type of direction given by Marian Manor's staff nurses and SNAs, i.e., instructing CNAs to perform the various tasks needed for patient care, is based on their greater skill and experience and does not require the independent judgment required by Section 2(11). *Ten Broeck Commons*,¹⁸ *Illinois Veterans Home at Anna L.P.*,¹⁹

Vencor Hospital-Los Angeles.²⁰ The CNAs are assigned to a group of residents for a month, at the end of which they are routinely rotated to the next group. The staff nurses, SNAs, and CNAs collaborate in dividing the residents into groups in a manner that balances the workload. Even assuming that the CNAs played no role in this process, the Board has found that work assignments made to equalize work among employees do not require the exercise of independent judgment. *Parkview Manor*.²¹ I find that the staff nurses' or SNAs' reassignment of the CNAs or residents from time to time to accommodate a resident who prefers a female CNA, to protect a pregnant CNA from infection, or to meet the needs of a difficult resident does not require the exercise of independent judgment called for by Section 2(11).

Although the Board has consistently found supervisory status when nurses independently perform employee evaluations which lead directly to personnel actions, the Board has just as consistently declined to find supervisory status when nurses perform evaluations that do not, by themselves, directly affect other employees' job status. *Vencor Hospital-Los Angeles*,²² *Ten Broeck Commons*,²³ At the outset, I note that there is no evidence that staff nurses who work on the day shift complete evaluations or even suggest ratings; their role in the process is limited to giving the unit supervisors generalized feedback as to whether or not the CNAs on their unit are performing their jobs appropriately. With respect to the staff nurses on the evening and night shifts, who do complete performance evaluations, there is some evidence that nursing supervisors sometimes alter the ratings that the staff nurses give the CNAs. Thus, Marian Manor has failed to demonstrate that staff nurses independently perform these evaluations.

Assuming that the staff nurses' ratings were never or only rarely changed by their superiors, however, I would still find that their role in completing the forms does not confer supervisory status, because Marian Manor has failed to demonstrate that the evaluations directly affect the CNAs' tenure or conditions of employment. The evaluations have no effect on wage increases and do not include recommendations for retention or promotion. The fact that Marian Manor's higher managers may consider the evaluations when CNAs are up for a promotion or apply for a scholarship is far too vague an impact to form the basis for a finding of supervisory status, particularly where Marian Manor has introduced no evidence that any CNA has ever been promoted or granted a scholarship because of an evaluation completed by a staff nurse. While the evaluation form states that three unsatisfactory evaluations will result in termination, there is no evidence that any employee has ever been terminated as a result of poor evaluations. *Harborside Healthcare*²⁴ (no employee has been terminated based on an evaluation); *Northern Montana Health Center*²⁵ (testimony

¹⁴ 273 NLRB 1677, 1689 (1985).

¹⁵ 175 NLRB 871 (1969).

¹⁶ 241 NLRB 181 (1979).

¹⁷ 308 NLRB 101, 102 (1992).

¹⁸ 320 NLRB 806, 811 (1996).

¹⁹ 323 NLRB 890, 891 (1997).

²⁰ 328 NLRB 1136, 1139 (1999).

²¹ 321 NLRB 477, 478 (1996).

²² *Supra* at 1139.

²³ *Supra* at 813.

²⁴ 330 NLRB 1334, 1335 (2000).

²⁵ 324 NLRB 752, 754 (1997).

included no examples of any discharge based on an LPN's evaluation of a nurse's aide).

Nor do I find that the staff nurses' and SNAs' involvement in discipline renders them Section 2(11) supervisors. The record evidence in this case clearly establishes that staff nurses do not themselves discipline employees; not one disciplinary form issued by a staff nurse was entered into evidence. Nor can it be said that the staff nurses effectively recommend discipline. In the first instance, there is no evidence that a staff nurse has ever recommended that any particular level of discipline be imposed. Their role is merely to report incidents of unacceptable work performance or behavior to their supervisors. More important, it is clear that the unit supervisors or nursing supervisors who receive such reports independently investigate these matters themselves by interviewing all parties involved before deciding what action, if any, to take. In such circumstances, the Board has found that charge nurses are not supervisors. *Ten Broeck Commons*;²⁶ *Northcrest Nursing Home*.²⁷

The evidence does not warrant a different result with respect to the SNAs' authority to discipline. According to SNA Bentic, her unit supervisor independently investigates disciplinary incidents by interviewing the employees involved herself. The authority to issue written counseling forms of the kind involved here, even if issued independently by the SNAs, is too minor a disciplinary function to constitute statutory authority. *Ohio Masonic Home*.²⁸ While the record includes one written warning issued by an SNA, there is no evidence regarding the circumstances under which it was issued, i.e., whether Gregor issued the warning independently, without any independent investigation by her supervisor. In any event, the Board has found that the authority to issue written reprimands and warnings does not confer supervisory status where the warnings themselves do not automatically result in adverse action. *Evangeline of Natchitoches, Inc.*;²⁹ *Illinois Veterans Home at Anna L.P.*³⁰

Finally, *Marian Manor* asserts that the staff nurses and SNAs are supervisors because they receive the larger life insurance benefit received by other stipulated supervisors and because the SNAs wear the same uniform as the unit and nursing supervisors. While the existence of secondary indicia such as these may be considered in assessing the likelihood that certain individuals are supervisors, the Board has held that such factors may not transform them into supervisors in the absence of evidence that the individuals possess one or more of the statutory powers. *Northcrest Nursing Home*.³¹ For the reasons set forth above, I find that they do not.

Appropriateness of the Units Sought by Local 285

As noted above, Local 285 seeks to represent two units of employees employed by *Marian Manor*: 1) it seeks a service and maintenance unit that would include certified nursing assistants, senior nursing assistants, cooks, dietary aides, food ser-

vice workers, bakers, assistant cooks, kitchen porters, laundry workers, activities leaders, office assistants, porters, housekeepers, resident care techs, rehab aides, stock clerks, store-room clerks, unit assistants, unit secretaries, hairdressers, and clinic coordinators, and 2) it seeks a unit of staff nurses, including RNs and LPNs.

Marian Manor asserts that the smallest appropriate unit must include all of its nonsupervisory employees. In its view, there should be one bargaining unit that includes, in addition to the employees sought by Local 285, employees in the following classifications: maintenance mechanic, painter, carpenter, groundskeeper, switchboard operator, relief operator, clerk-typist, case mix nurse, social worker, admissions coordinator, assistant admissions coordinator, Medicare coordinator, RN assessment and care plan coordinator, MDS nurse, medical secretary, nursing secretary, accounts receivable supervisor, accounts payable clerk, bookkeeping clerk, bookkeeper IV, posting clerk, staff development assistant, and payroll distribution clerk. Alternatively, *Marian Manor* asserts that each of these classifications must be included in one of the two units sought by Local 285.

Administrator Sister Pauline Ross oversees social services, nursing services, development, quality assurance and assessment, corporate compliance, mission effectiveness, and medical records. Two assistant administrators report to Ross. Assistant administrator Maureen Rynkiewicz is responsible for switchboard/reception/clerical services, maintenance, security, housekeeping, and grounds. The second assistant administrator³² is responsible for pastoral care, activities, food services, and volunteers. A comptroller/human resources director, Joseph Fitzpatrick, who also reports to Ross, is responsible for finance, risk management, human resources, and staff development.

Maintenance Department Employees

Director of maintenance/safety, John Donovan, reports to Rynkiewicz, maintenance supervisor, Donald Lynch, reports to Donovan.³³ Five maintenance mechanics, two painters, a carpenter, and a groundskeeper report to Donovan. The maintenance mechanics are handymen who make repairs all over the facility. They do light plumbing, electrical, and heating work. They maintain the laundry equipment, kitchen equipment, and air conditioning units, repair locks and hinges, install floor tile, hang pictures, replace light bulbs, clean drains, and the like. The painters do painting and wallpapering. The carpenter spends 50 percent of his time doing carpentry work and the rest of his time doing general maintenance work. The groundskeeper maintains the grounds outside the building, including the removal of snow and ice.

The maintenance department employees divide their time between an ongoing renovation project,³⁴ planned maintenance,

²⁶ Supra at 812.

²⁷ 313 NLRB 491, 497 (1993).

²⁸ 295 NLRB 390, 394 (1989).

²⁹ 323 NLRB 223, 224 (1997).

³⁰ 323 NLRB 890 (1997).

³¹ 313 NLRB 491, 500 (1993).

³² This position is currently vacant.

³³ The parties have stipulated, and I find, that the director of maintenance/safety director and the maintenance supervisor are statutory supervisors who should be excluded from any unit found appropriate.

³⁴ The maintenance department employees have been working on a renovation project for the last 3 years, which is nearing completion.

and requests for repairs. The maintenance shop is located on the third floor of East building, but the maintenance employees make repairs throughout the facility and spend the majority of their time working on the units. The staff requests repairs by completing a work requisition form and bringing it to the maintenance department. Donovan assigns the jobs. Maintenance employees may check in with a supervisor at the nurses' station, kitchen, or housekeeping area when they go to make repairs in those areas. They interact with the CNAs and SNAs to schedule a time to make repairs in a resident's room.

The maintenance mechanics, carpenter, and painters may be assigned to assist the groundskeeper with snow and ice removal or with large projects such as mulching in the spring or trimming trees and bushes. On rainy days the groundskeeper works inside, assisting the painter, carpenter, or maintenance mechanics. The groundskeeper spends about 20 percent of his time each week working with the other maintenance department employees.

Most of the maintenance department employees work a Monday through Friday day shift starting at 7:15 or 8:15 a.m. The maintenance mechanics rotate weekend coverage, and one of them works from 3 to 11 p.m.

The general maintenance mechanics are required to have a high school or trade school degree with experience in maintenance desired. The painter is required to be a high school graduate with a year's experience as a painter or one to three years of experience as a painter/helper. The carpenter is required to have a high school or trade degree with 3 to 5 years of carpentry experience. The record does not reveal the qualifications of the groundskeeper.

Reception/Switchboard/Clerical Department Employees

One full-time switchboard operator, six part-time relief operators, and a clerk-typist report to Assistant Administrator Maureen Rynkiewicz. The switchboard operator works at the front desk in the lobby where visitors enter. She operates a switchboard and paging system, takes messages, accepts deliveries, sorts mail, screens and directs visitors, and performs general office duties, such as stuffing envelopes and addressing mail. The relief operators perform similar functions during the evenings and weekends.

A part-time clerk-typist, Lois Miller, works near the switchboard area. She performs typing and clerical work for all departments. Requests for her services go through Rynkiewicz, who assigns the work to Miller. Miller may need to interact with whoever has requested the job if she has question about it. She has performed work such as typing a policy and procedures manual for the medical records and staff development departments, typing meeting minutes for SNAs, staff nurses, or unit supervisors in the nursing department, typing a quarterly newsletter, and performing typing work for the social services department for a few months when it was short-staffed.

Medical Records Department Employees

Director of medical records, Barbara McCann, who is a registered nurse, reports to the administrator. A Medicare coordi-

nator, RN assessment and care plan coordinator, MDS nurse, medical secretary, and a medical records supervisor report to McCann. Several unit secretaries report to the medical records supervisor, Cheryl Geisel.³⁵ The only medical records department employees petitioned for are the unit secretaries, whom Local 285 seeks to include in the service and maintenance unit.

The Medicare coordinator, RN assessment and care plan coordinator (also known as the MDS coordinator), and the MDS nurse are required to be licensed nurses.³⁶ The incumbents are all RNs. None of them provides clinical care to residents. The Medicare coordinator determines whether new residents or residents returning from a hospital stay qualify for skilled care and are thus eligible for Medicare. She spends about 70 percent of her time in her office and the balance meeting with staff from other departments, including nurses, social workers, physical therapists, speech therapists, dieticians, and doctors. She attends weekly Medicare meetings with other departments to review the Medicare eligibility of residents. She completes minimum data set (MDS) forms that nursing homes are required to submit to the State periodically for each Medicare resident. She works from 8 a.m. to 4 p.m., Monday through Friday. She also takes calls on the weekends for admissions.

The RN assessment and care plan coordinator, also known as the MDS coordinator, and the MDS nurse perform a function similar to that of the Medicare coordinator for non-Medicare residents, i.e., residents who are eligible for Medicaid or who pay for their care on a private basis. The MDS nurse reports to the MDS coordinator, who gives her her assignment for the week and is somewhat more skilled. They each hold interdisciplinary care plan meetings twice a week, one to cover new admissions and annual reviews, and a second to perform the quarterly reviews required for each resident. They review about 35 residents per week. The meetings may include a staff nurse or unit supervisor, SNA, dietician, rehabilitation worker, social worker, and activity leader. They complete the nursing assessment portion of the MDS forms for Medicaid-eligible residents and make sure that the other disciplines complete their portion. They review residents' records and may ask a staff nurse or unit supervisor about a resident's status. The MDS coordinator works from 9 a.m. to 3:30 p.m., Monday through Friday. The MDS nurse also works part-time, Monday through Friday. They spend about half their time in the medical records office and half on the units running the interdisciplinary meetings and reviewing records.

The medical secretary maintains records such as the discharge and death index. She arranges for the destruction of resident records. She schedules the interdisciplinary meetings held regarding each resident and notifies the various departments about the upcoming meetings. She does some typing, although that is not her primary responsibility. She spends 75

³⁵ The parties have stipulated, and I find, that director of medical records, Barbara McCann, and medical records supervisor, Cheryl Geisel, are statutory supervisors who should be excluded from any unit found appropriate.

³⁶ The job descriptions for staff nurse, Medicare coordinator, RN assessment and care plan coordinator, MDS nurse, and case mix/safety nurse all require a graduate of an accredited school of nursing who is currently licensed in Massachusetts.

They each spend 1-1/2 to 2-1/2 days per week working on the renovation project.

percent of her time in her office, but goes to the units to give the nurses and SNAs a list of residents whose reviews are coming up, to obtain a signature needed to release records, or to obtain information for a lab or oxygen company that provides services to the facility. She works from 7 a.m. to 3 p.m., Monday through Friday. The incumbent medical secretary was promoted to her current position from that of unit secretary.

Apart from the staff nurses, SNAs, CNAs, RCTs, and unit assistants, whose duties are described above, the unit secretary is the only position in the petitioned-for unit about which there is record evidence. The unit secretaries report to the medical records supervisor, who reports, in turn, to the director of medical records. Unit secretaries work from 7 or 8 a.m. to 3 p.m. They are each assigned to cover two to three units. They are responsible for the residents' charts and start the paperwork for discharges. They book appointments for residents and arrange transportation for them. They call the dietary department if food trays have not been delivered and page the maintenance department regarding repairs needed on the unit. They photocopy documents. They bring discharge charts to the medical secretary and may ask the medical secretary for forms to request a discharge summary from a hospital. They interact with the switchboard operator in picking up mail, flowers, and packages for residents, or may tell the switchboard operator that an ambulance will be picking up a resident.

Nursing department employees

Case mix/safety nurse Kathleen Conley reports to RN Kathleen Anello, the case mix supervisor, who reports in turn to the director of nursing.³⁷ The case mix/safety nurse must be a licensed nurse; Conley is an LPN. Conley does not provide any clinical care. She assists the case mix supervisor in submitting quarterly management minute questionnaire (MMQ) forms for every resident to the State Department of Public Welfare for purposes of Medicaid reimbursement.³⁸ As part of this process, she reviews the nursing department's compliance with the requirement to document resident care by completing treatment sheets, summaries, activities of daily living sheets, behavior sheets, and positioning sheets. She observes residents and reviews the nurses' assessments of residents. She speaks to an SNA if there is a problem with the activities of daily living sheets that the CNAs are required to complete. In her role as safety nurse, she reviews incident reports and investigates reports of injuries to residents. She assists the case mix supervisor and pharmacy supervisor with "CQI" audits and participates in audits by the Department of Public Health. Conley acts as a liaison with the pharmacy and makes sure that medical supplies arrive on time. Conley works from 8 a.m. to 4 p.m., Monday through Friday. She shares an office with Anello near the medical records office and spends about half her time there and half on the units.

³⁷ The parties have stipulated, and I find, that case mix supervisor, Kathleen Anello, is a statutory supervisor who should be excluded from any unit found appropriate.

³⁸ The case mix/safety nurse completes MMQ forms for every resident, even those that are not eligible for Medicaid.

The nursing secretary reports to the director of nursing.³⁹ She performs a variety of typing work for the department, assists the staffing coordinator in scheduling nursing employees, maintains nursing department files, distributes mail, schedules meetings, takes minutes, and answers nursing office phones.

Social Service Department Employees

Director of social services, Carol Malinowski, reports to the administrator.⁴⁰ Three social workers, an admissions coordinator,⁴¹ and two assistant admissions coordinators report to her. The admissions office is located on the first floor near the switchboard. The social workers work out of offices in the West and South buildings.

The admissions coordinator and assistant admissions coordinators are responsible for promoting a smooth transition for new residents. They give tours of the facility and visit and assess potential residents in hospitals and homes. They provide pre-admission information about residents to the medical records, nursing, and activities staff. They contact the housekeeping department to prepare a room for new residents and check the room on the day of admission; they may occasionally clean a room with a housekeeper if it is not ready for an imminent admission. They may work with the housekeeping or laundry departments to resolve problems for newly admitted residents. They work days, Monday through Friday, although one of them covers weekends. The admissions coordinator and assistant admissions coordinators are required to have a high school diploma and secretarial experience. The admissions coordinator is a licensed social worker;⁴² Malinowski testified that the license is not required for the position, but it is helpful.

The three social workers are required to be licensed social workers; two have master's degrees and one has a bachelor's degree.⁴³ Each of them covers three units and about 120 to 140 residents. They are responsible for assisting residents with any problems that may arise. For example, they help set up guardianships and complete resuscitation and health care proxy forms. They respond to inquiries from residents' families and help them obtain medical records from the medical records department. They assist residents with roommate or tablemate problems. They arrange for the maintenance department to install televisions for residents that bring them and arrange for the installation and disconnection of telephone lines. They arrange for services for residents who are discharged to their homes and communicate with other facilities to which residents are discharged. The social workers complete a social work history on each resident within 14 days of admission and complete the

³⁹ Her job description states that she reports to the director of nursing, although an organizational chart for the department indicates that she reports to the staffing coordinator, who reports to the assistant director of nursing.

⁴⁰ The parties have stipulated, and I find, that Director of Social Services Carol Malinowski is a statutory supervisor who should be excluded from any unit found appropriate.

⁴¹ There is currently just one admissions coordinator, although the facility normally has two.

⁴² The admissions coordinator has only a high school diploma, but was "grandfathered in" to obtain her license.

⁴³ The parties have stipulated, and I find, that the social workers are professional employees.

social work portion of the MDS forms. They attend the twice-weekly interdisciplinary care plan meetings. The social workers work days from Monday through Friday, although one of them works until 8 p.m. on Wednesdays.

Accounting department employees

The accounting department is headed by a comptroller, who reports to the administrator, and an assistant comptroller.⁴⁴ The accounting office is located in the same area as the social services and human resource department offices. This department includes a bookkeeper IV, three bookkeeping clerks, an accounts payable bookkeeper, an accounts receivable supervisor, and a posting clerk, all of whom Marian Manor would include in the unit.

Bookkeeper IV, Joanne Costello, works at a desk in the social services office and is jointly supervised by the comptroller and the director of social services.⁴⁵ Costello is responsible for completing the forms required for the approval of Medicare and Medicaid applications for new and re-admitted residents. She notifies the State Department of Public Welfare regarding any changes in the status of Medicaid residents. Hospitals contact Costello regarding residents to be discharged to Marian Manor, and Costello informs the staff nurses about the residents to be admitted to their unit. Staff from the units, including supervisors, staff nurses, or SNAs, give her information about residents' diagnosis and medications. She interacts with the social workers, MDS staff, Medicare coordinator, and the case mix/safety nurse.

Costello has a bachelor's degree and is a licensed social worker, although her job requires only a high school diploma, with a college degree preferred. Because of her background, she occasionally attends interdisciplinary care plan meetings on behalf of the social services department when no social worker is available to go.

Three bookkeeping clerks, Cathy O'Connor, Lois Hayes, and Sandra Kelly, prepare bills for private-pay residents and for insurance companies, showing Marian Manor's charges and payments made. Kelly also works in a bank maintained for residents that is open for business 2-hours per day, and she does the bookkeeping for the bank. The bookkeeping clerks work Monday through Friday during the day. One works part-time and two work full-time.

Accounts payable bookkeeper, Barbara Frazer, pays Marian Manor's bills. She matches invoices with purchase orders. About 30 percent of the bills she receives for payment have no corresponding purchase order. In that event, she contacts the relevant department to confirm that the bill should be paid. She usually talks to a supervisor such as the director of nursing, director of maintenance, or housekeeping director. In some cases she may speak to a staff nurse or SNA who can obtain

information from a resident's chart regarding medications, oxygen, or X-ray services that have been provided.

Accounts receivable supervisor, Ellie Brock, processes checks received by Marian Manor and credits them to the proper account. She assigns work to posting clerk, Marie Bailey, who also performs this function. Bailey also works in the bank for residents.

Human resources employees

The human resources department is headed by a human resources director, who reports to the administrator. The department is located near the accounting office. Payroll distribution clerk, Lisa Mallon, reports to the payroll supervisor, who reports to the human services director. Mallon works 1-day per week from 8 a.m. to 4 p.m., distributing paychecks in sealed envelopes. Employees come to her office to pick up their paychecks.

Two staff development assistants, Mary Ellen Rehm and Nancy Roache, report to the staff development director, Wanda English, who reports to the human resources director. The staff development assistants perform four functions. First, they assist English in running 2-week training programs that lead trainees to certification as certified nursing assistants. Participants in these programs may not necessarily become employees of Marian Manor. The two staff development assistants each spend 2 weeks per month assisting English in this program. Second, the staff development assistants orient newly hired CNAs to Marian Manor, by virtue of a 1-week training program on the units on 3 North or 4 North. They observe the CNAs working with residents and, at the end of the week, report their observations of the CNAs' work in a written report. They make no recommendations regarding continued employment. Third, the staff development assistants run a general orientation program every Monday for new employees in all departments. They run a film, hand out policies and procedures, and give tours of the facility. Fourth, the staff development assistants assist the staff development director during continuing education programs by running films and distributing handouts and sign-in sheets. There are about 25 in-service programs each month, each lasting about 45 minutes to an hour. The staff development assistants are required to be high school graduates or have equivalent life experience.

Working Conditions and Benefits

The same employee handbook and policies apply to all Marian Manor employees. With the exception of the life insurance benefit described above, all nonsupervisory employees receive the same fringe benefits. Marian Manor has a coffee shop that is used by all of its employees for meals and breaks.

The staff nurses and employees in the petitioned-for service and maintenance unit are hourly paid. The Medicare coordinator, case mix/safety nurse, admissions coordinator, social worker, and bookkeeper IV are salaried employees. The RN assessment and care plan coordinator, MDS nurse, staff development assistants, assistant admissions coordinators, and maintenance department employees are hourly paid. The pay of the staff nurses, CNAs, unit assistants, and RCTs varies, depending on their shift.

⁴⁴ Corporate compliance officer, Kevin Coyne, testified about these employees; he does not supervise them but works with them. The parties have stipulated, and I find, that Coyne is a statutory supervisor who should be excluded from any unit found appropriate.

⁴⁵ The director of social services performs Costello's annual evaluation, but the accounting office gives her direction in terms of financial matters.

Analysis

In *Park Manor Care Center*,⁴⁶ the Board ruled that the proper test for determining the appropriateness of bargaining units in nonacute care health care institutions is the “empirical community of interest test.” Under that test, the Board considers community-of-interest factors, as well as those factors considered relevant by the Board in its rulemaking proceedings on Collective-Bargaining Units in the Health Care Industry.⁴⁷ The Board further considers the evidence presented during rulemaking with respect to units in acute care hospitals, and prior cases involving either the type of unit sought or the type of health care facility in dispute.

As always, in making unit determinations, the Board’s task is not to determine the most appropriate unit, but simply to determine an appropriate unit. *P. J. Dick Contracting*.⁴⁸ In so doing, the Board looks first to the unit sought by the petitioner. If it is appropriate, the inquiry ends. If however, it is inappropriate, the Board will scrutinize the Employer’s proposals. *Dezcon, Inc.*⁴⁹

A. Appropriateness of a Service and Maintenance Unit

Since the rulemaking, the Board has held that a service and maintenance unit in a nursing home is presumptively appropriate. *Jersey Shore Nursing & Rehabilitation Center*.⁵⁰ I find, therefore, that the service and maintenance unit sought by Local 285 is an appropriate unit and end the scope of the inquiry there. There remain, however, several unit composition issues.

1. Maintenance department employees

Local 285 asserts, citing *Hebrew Home & Hospital*,⁵¹ that the maintenance department employees must be excluded from the unit as skilled maintenance employees. In that case, the Board approved a petitioned-for skilled maintenance unit consisting of the plant operations and maintenance department at a nursing home, notwithstanding the employer’s assertion that the employees were not skilled maintenance employees and belonged in a unit with other unskilled, nonprofessional employees. Unlike the case here, however, three of the nine maintenance mechanics in *Hebrew Home & Hospital* were licensed as maintenance mechanics or electrical engineers and were, thus, able to independently perform plumbing, mechanical, and electrical work. One employee had obtained his license after completing an apprenticeship program, the hallmark of a skilled maintenance employee. In contrast, none of the maintenance employees at Marian Manor is licensed and none has completed an apprenticeship program. The maintenance employees perform routine repair work that does not require the level of skill necessary to a finding of skilled maintenance status. See *Four*

*Seasons Nursing Center of Joliet*⁵² (petitioned-for unit of maintenance employees at a nursing home does not have interests separate from those of other employees, where their duties do not require a high degree of skill or specialized training; employees perform duties such as moving furniture, replacing light bulbs, keeping up the outer grounds, minor functions of carpentry, painting, and painting, and minor repair work). I shall include them in the service and maintenance unit.⁵³

2. Clerical employees

Local 285 seeks to exclude the accounts receivable supervisor, posting clerk, accounts payable clerk, bookkeeping clerks, payroll distribution clerk, switchboard operator, relief operator, and clerk-typist as business office clericals. Local 285 contends that, notwithstanding her title, the bookkeeper IV’s function allies her with the social services department, so that she should be included in a unit of other professionals; alternatively, it seeks to exclude her as a business office clerical.⁵⁴ Marian Manor seeks to include all of these employees in the service and maintenance unit.

In the rulemaking, the Board recognized the distinction between business office clericals, who are typically excluded from service and maintenance units, and other clericals, who are consistently included in such units where they have contact with the service and maintenance employees. The Board noted that business office clericals perform distinct functions, such as handling finances and billing, and dealing with Medicare, Medicaid, and other reimbursement systems. They are generally supervised separately in business office clerical departments and have little interaction with other nonprofessionals. *Lincoln Park Nursing Home*.⁵⁵

I find that the accounts receivable supervisor, posting clerk, accounts payable clerk, bookkeeping clerks, and bookkeeper IV are business office clericals and will exclude them from the unit. All of them are separately supervised in the accounting department.⁵⁶ They perform traditional business office clerical functions, such as billing, handling reimbursement from Medicare and Medicaid, posting checks to the proper account, and bookkeeping. *CGE Caresystems, Inc.*⁵⁷ (billing, filing, and accounting clerks who work in separate billing area and are responsible for processing bills and claims under Medicare and other reimbursement programs excluded from service and maintenance unit).

I find that the remaining clericals, i.e., the medical secretary, nursing secretary, switchboard operators, relief operators, clerk-typist, and payroll distribution clerk, share a sufficient commu-

⁴⁶ 305 NLRB 872 (1991).

⁴⁷ Second Notice of Proposed Rulemaking, 53 Fed.Reg. 33900 (1988), reprinted at 284 NLRB 1528, and Final Rule, 54 Fed. Reg. 16336 (1989), reprinted at 284 NLRB 1580 and codified at Sec. 103.30 of the Board’s Rules.

⁴⁸ 290 NLRB 150 (1988).

⁴⁹ 295 NLRB 109, 111 (1989).

⁵⁰ 325 NLRB 603 (1998).

⁵¹ 311 NLRB 1400 (1993).

⁵² 208 NLRB 403 (1974).

⁵³ In light of my finding that none of the maintenance department employees is a skilled maintenance employee, I find it unnecessary to reach the issue of whether or not Local 285 should be relieved of its stipulation to include the groundskeeper in the service and maintenance unit. I would have reached the same result even if the parties had never stipulated to include the groundskeeper in the unit.

⁵⁴ Local 285 took no position in its posthearing brief with respect to the medical secretary and nursing secretary.

⁵⁵ 318 NLRB 1160, 1164 (1995).

⁵⁶ The bookkeeper IV is jointly supervised by the accounting and social services departments.

⁵⁷ 328 NLRB 748 (1999).

nity of interest with the petitioned-for service and maintenance employees to warrant their inclusion in the unit. In reaching this conclusion, I note that the petitioned-for unit includes other clerical employees, i.e., unit secretaries. The petitioned-for unit secretaries are located in the same department as the medical secretary, and the current medical secretary was previously a unit secretary. The medical secretary, switchboard operators, relief operators, and clerk-typist have work-related contact with unit employees. For instance, the switchboard operators interact with the unit secretaries, who pick up mail, flowers, and packages for residents and inform the switchboard operators that ambulances will be arriving to pick up residents. The medical secretary goes to the units to exchange information with the staff nurses and SNAs. The clerk-typist types meeting minutes for SNAs and staff nurses, and the payroll distribution clerk distributes paychecks to all employees. *Lincoln Park Nursing Home*⁵⁸ (nursing department secretaries, nursing department payroll clerk, and receptionists fit within the “other types of clericals” classifications which traditionally have been included in service and maintenance units, notwithstanding that they have limited or no interaction with service and maintenance employees and do not perform work closely related to the functions performed by service and maintenance employees); *Levine Hospital of Hayward*,⁵⁹ (medical records clerks and transcribers belong in currently existing broad service and maintenance unit).

3. Staff development assistants

The staff development assistants share a sufficient community of interest with the petitioned-for service and maintenance employees to warrant their inclusion in the unit. They train the new CNAs during their orientation period and have contact with other service and maintenance employees during general orientation and continuing education programs. They are high school graduates whose level of education is similar to that of other unit employees and, like them, they are hourly paid.

4. Assistant admissions coordinators

I also find that the assistant admissions coordinators share a sufficient community of interest with the service and maintenance employees to include them in the unit. They must interact with employees in various departments, including housekeeping, nursing, and medical records, in order to ensure a smooth transition for new residents. Like the unit employees, they are high school graduates and hourly paid.

B. Appropriateness of a Unit of All Staff Nurses

Local 285 seeks to represent a unit limited to staff nurses, both RNs and LPNs.⁶⁰ As an alternative to its primary contention that only a wall-to-wall unit composed of all of its profes-

sional and nonprofessional employees is appropriate,⁶¹ Marian Manor contends that the social worker, admissions coordinator, RN assessment and care plan coordinator, MDS nurse, Medicare coordinator, and case mix/safety nurse must be included in the petitioned-for unit of staff nurses.

I must first consider whether the petitioned-for staff nurses could constitute a separate appropriate unit. The record reflects that the staff nurses are administratively segregated into the nursing department. They are all required to be graduates of an accredited nursing program and currently licensed by the Commonwealth of Massachusetts. Their supervisors, i.e., unit supervisors, nursing supervisors, the assistant director of nursing, and the director of nursing, are all nurses. The staff nurses are engaged in the direct care of residents. They are the only professionals who provide around-the-clock coverage on the units during three 8-hour shifts. They participate in interdisciplinary care plan meetings with social workers, the RN assessment and care plan coordinator, MDS nurse, and Medicare coordinator. There is no evidence of any transfers or interchange between the staff nurses and these other nurses, the social worker, or the admissions coordinator. The staff nurses are hourly paid, and their pay varies by shift.

In *South Hills Health System Agency*,⁶² the Board considered for the first time since *Park Manor* whether a unit limited to RNs at a nonacute care home health facility, rather than a unit of all professional employees, is appropriate for collective bargaining. In that case, the Board denied review of the Regional Director’s determination that the petitioned-for all-RN unit was appropriate. For the same reasons set forth in that case, I find that a unit limited to RNs and LPNs is appropriate at Marian Manor. The specialized training and licensure required of nurses clearly prevents other professionals from performing RN or LPN work and vice versa. Although the staff nurses and social workers participate together in interdisciplinary teams, the Board has found that the use of a multidisciplinary team approach to ensure the coordination of care does not alter each licensed professional’s responsibility for his or her individual scope of practice. As it does not appear that a combined unit of RNs, LPNs, and other professionals is the only appropriate unit for collective bargaining, I shall exclude the social workers and admissions coordinator from the unit.

The issue of whether the smallest appropriate unit must also include nurses who do not perform direct care of residents, i.e., the Medicare coordinator, RN assessment and care plan coordinator, MDS nurse, and case mix/safety nurse, presents a closer question. The Board has sometimes found that nurses who perform administrative duties such as the nurses in dispute here are properly included in a unit of direct care nurses, because of their common education and licensure and because they spend most of their time on patient care units where they have frequent contact with staff nurses, notwithstanding the fact that they are separately supervised, do not work around the clock, and never fill in for staff nurses. *Pocono Medical Center*⁶³

⁵⁸ Supra at 1163–1165.

⁵⁹ 219 NLRB 327 (1975).

⁶⁰ I find, pursuant to well-established Board law, that the RNs are professional employees and the LPNs are nonprofessional, technical employees. Therefore, an election in such a unit would require the Board to employ its *Sonotone* procedures. See, *Sonotone Corp.*, 90 NLRB 1236 (1950).

⁶¹ Obviously, I have rejected that contention in approving the petitioned-for service and maintenance unit.

⁶² 330 NLRB 653 (2000).

⁶³ 305 NLRB 398 (1991).

(discharge planner and quality review nurses included in RN unit); *Long Island College Hospital*⁶⁴ (small number of RNs employed outside the nursing department, including utilization review coordinators, included in RN unit); *Frederick Memorial Hospital*⁶⁵ (RNs employed outside of the nursing division, including a utilization review nurse and infection surveillance nurse, included in RN unit). But see *Ralph K. Davies Medical Center*⁶⁶ and *Addison Gilbert Hospital*,⁶⁷ in which the Board declined to include utilization review coordinators in RN units because of the administrative nature of their duties.⁶⁸

I find that the interests of the nondirect care nurses at issue here are more closely aligned with those of the staff nurses than those of the other professionals at Marian Manor. These nurses have the same educational background and license as the staff nurses and, like the staff nurses, report to other nurses. They have substantial work-related contact with the staff nurses in completing the documentation required by Medicare and Medicaid and in attending interdisciplinary meetings to formulate care plans. I also note that they appear to be the only other nonsupervisory nurses at Marian Manor.⁶⁹ Accordingly, I shall include them in the unit with the staff nurses.

CONCLUSION

Accordingly, based on the foregoing and the stipulations of the parties at the hearing, I find that the following employees of Marian Manor constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time service and maintenance employees employed by Marian Manor at its South Boston, Massachusetts facility, including certified nursing assistants, senior nursing assistants, resident care technicians, rehab aides, unit assistants, unit secretaries, cooks, assistant cooks, dietary aides, kitchen porters, food service workers, bakers, laundry workers, activities leaders, office assistants, porters, housekeepers, stock clerks, storeroom clerks, hairdressers, clinic coordinators, maintenance mechanics, painters, carpenter, groundskeeper, payroll distribution clerk, switchboard operator, relief operators, clerk-typist, medical secretary, nursing secretary, staff development assistants, and assistant admissions coordinators, but excluding business office clericals, guards, and supervisors as defined in the Act.

With respect to the staff nurses' unit, in view of the statutory requirement that the Board may not join professional and nonprofessional employees in a single unit without the desires of the professional employees being determined in a separate vote, I shall, pursuant to the Board's decision in *Sonotone Corp.*,⁷⁰

⁶⁴ 256 NLRB 202, 207 (1981).

⁶⁵ 254 NLRB 36, 38-39 (1981).

⁶⁶ 256 NLRB 1113 (1981).

⁶⁷ 253 NLRB 1010 (1981).

⁶⁸ In both of those cases, unlike here, however, the Board also relied on the fact that the utilization review coordinators were not required to be nurses.

⁶⁹ The organizational chart for the nursing department shows an infection control nurse and a staffing coordinator, but there was no testimony or other evidence about these positions.

⁷⁰ 90 NLRB 1236 (1950).

direct separate elections in voting groups 1 and 2. The employees in group 1, the professional employees, will be asked the following two questions on their ballots.

1. Do you desire to be included in the same unit as nonprofessional employees employed by the Employer for the purposes of collective bargaining?

2. Do you desire to be represented for the purposes of collective bargaining by Service Employees International Union, Local 285, AFL-CIO?

If a majority of the professional employees in voting group 1 vote yes to the first question, indicating their desire to be included in a unit with nonprofessional employees, they will be so included. Their vote on the second question will then be counted with the votes of the nonprofessional employees in voting group 2 to decide the representative for the combined bargaining unit. If, on the other hand, a majority of the professional employees in voting group 1 do not vote for inclusion, they will not be included with the nonprofessional employees and their votes on the second question will be separately counted to decide whether or not they wish to be represented by the Petitioner in a separate professional unit.

The ultimate determination as to the appropriate unit or units is based on the result of the election. However, I make the following findings with regard to the appropriate unit.

1. If a majority of the professional employees vote for inclusion in a unit with nonprofessional employees, I find that the following employees will constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time registered nurses and licensed practical nurses, including staff nurses, Medicare coordinator, RN assessment and care plan coordinator, MDS nurse, and case mix/safety nurse, but excluding all other employees, guards, and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with the nonprofessional employees, I find the following two units to be appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

UNIT 1:

All full-time and regular part-time registered nurses, including staff nurses, Medicare coordinator, RN assessment and care plan coordinator, and MDS nurse, but excluding all other employees, guards, and supervisors as defined in the Act.

UNIT 2:

All full-time and regular part-time licensed practical nurses, including staff nurses and case mix/safety nurse, but excluding all other employees, guards, and supervisors as defined in the Act.

DIRECTION OF ELECTIONS

Separate elections by secret ballot shall be conducted by the Regional Director among the employees in the unit and voting groups found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in

the unit and voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for

cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Service Employees International Union, Local 285, AFL-CIO.